

IN THE
Supreme Court of the United States

October Term, 1983

F/V BARANOF, its gear, paraphernalia, etc.:
BARANOF FISHERIES, a Washington Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee for
UNIVERSAL SEAFOODS, LTD.,
Petitioners,

v.

STATE OF ALASKA,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ALASKA

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION

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LIST OF PARTIES

The petition for Writ of Certiorari filed by petitioners on May 9, 1984 contains a complete list of all parties and all related corporations.



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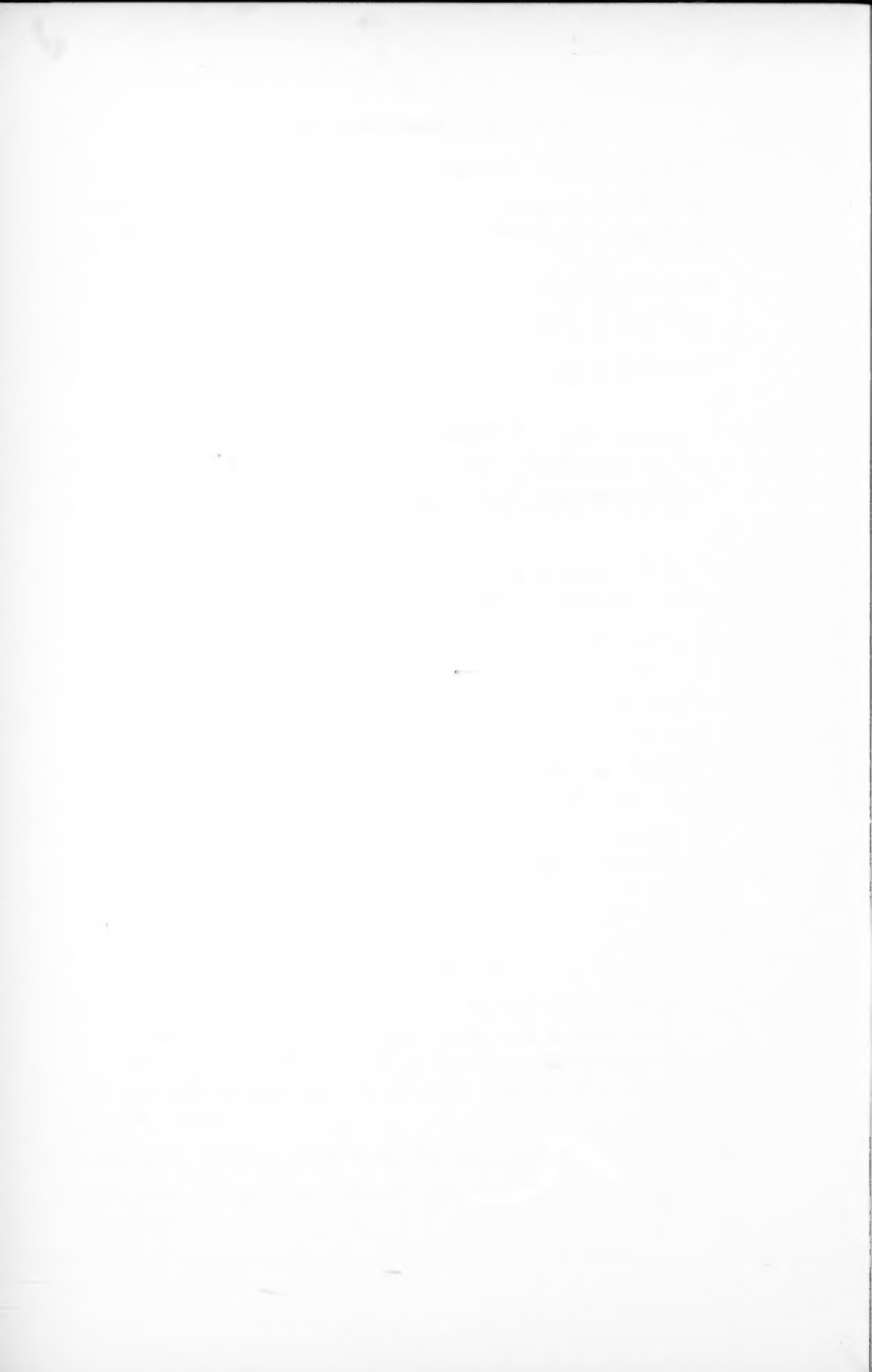
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STATE OF ALASKA,
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ARGUMENT

1. The Judgment Below Is Final for the Purpose of Review.

The decision of the Alaska Supreme Court below is reviewable under 28 U.S.C. § 1257 as the final judgment rendered by the highest court of the state of Alaska. While the Alaska Supreme Court remanded this case to the superior court for trial on the merits, the court rendered a final decision on all federal issues and made a final assertion of jurisdiction subject to no right of further state court review. Finality does not necessarily mean the last judgment possible to be made in a case. *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152 (1964). In deciding whether a

ruling is final for the purpose of review, this Court has followed a pragmatic, rather than a technical, approach. *Id.* at 152 (construing 28 USC § 1291); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (28 USC § 1291).

This matter fits within the type of case discussed in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975) where this Court treats a decision on a federal issue as a final judgment for the purpose of 28 USC § 1257 and takes jurisdiction before completion of the lower court proceedings when the highest court of the state has finally determined the federal issue present in the case, even though there are further proceedings contemplated in the lower state court. *Id.* at 477.

This Court should review the judgment below of the Alaska Supreme Court because all federal issues were judged with finality by the state court, so any additional proceedings in this case will not produce federal questions which may require review at a later date, and delay in reviewing the Alaska state court decision will seriously erode the federal policies set forth in the Magnuson Fishery Conservation and Management Act, 16 USC § 1801 *et seq.*, of providing an exclusive federal forum for alleged fishing violations outside each state's waters and of preempting state assertion of jurisdiction over non-residents fishing outside state waters. See *Cox Broadcasting Corporation v. Cohn*, *supra*, 420 U.S. at 482-83. In *Rosenblatt v. American Cyanamid Company*, 369 U.S. 937, 38 S.Ct. 1, 3 (1965), Mr. Justice Goldberg summarized this Court's prior decisions on the requirements of finality as expressed in *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963) and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), namely: (1) final assertion of jurisdiction with no possible review of that issue by the state court, (2) possibility of serious erosion of national policy, and (3) the state judgment is on an issue

anterior to and separable from the merits. The decision for which review is sought meets these tests. The state of Alaska has asserted final jurisdiction over this action, has dismissed the Baranof's assertion that proper jurisdiction should rest in the federal district court, and has effectively removed all of Baranof's federal defenses and all federal issues from this lawsuit. The state's judgment on subject matter jurisdiction and forum is separable from the state law issues remaining in the case. The state's assertion of jurisdiction threatens erosion of the federal policy favoring a federal forum for uniform interpretation and application of the Magnuson Fishery Conservation and Management Act. Baranof should not be forced to take the risk of an adverse judgment at trial on the merits in order to obtain the benefits of federal preemption and a federal forum available under the Magnuson Fishery Conservation and Management Act. See *Rosenblatt v. American Cyanamid Company*, *supra*, 86 S.Ct. at 3; *Shaffer v. Heitner*, 433 U.S. 186, 195 (1977); *Cox Broadcasting Corporation v. Cohn*, *supra*, 420 U.S. at 485 (1975).

In sum, the decision of the Alaska Supreme Court is final under the standards established by this Court and review is appropriate and timely.

2. This Matter Presents a Substantial Federal Question.

a. *The Alaska Supreme Court Has Decided a Novel Issue of Federal Law in a Manner Conflicting With Past Decisions of This Court.*

This Court has not yet had the occasion to interpret the jurisdiction and authority of the states under the Magnuson Fishery Conservation and Management Act for fishing performed by non-residents outside the state three-mile seaward boundary. The decision below leaves the state of Alaska free to regulate fishing in waters outside its three-mile water boundary by all fishermen, both citizens and non-citizens of Alaska. Although the Magnuson Fishery Conservation and Management Act prohibits state regulation of fishing vessels

beyond its seaward boundary unless those vessels are registered in the state, 16 USC § 1856(a), the Alaska Supreme Court interprets the term "registered" to include the purchase of an Alaskan fishing license required by the state of all fishermen fishing outside Alaskan waters. This interpretation of the Magnuson Fishery Conservation and Management Act is contrary to the Act's envisioned system of regional fishery controls formulated and monitored by regional fishery management councils, and is in direct conflict with decisions of this Court allowing state regulation of fishing outside state waters only if the fishermen resided in the state. *See Skiriotes v. Florida*, 313 U.S. 69 (1941). The F/V Baranof is owned by Washington residents and is home ported in the state of Washington; thus, Alaska's regulation of the F/V Baranof's fishing activities outside state waters is contrary to the principles set forth in *Skiriotes v. Florida*, *supra*.

b. Federal Issues Presented by this Case are Not Moot, but are Timely and Important.

The state of Alaska argues in its brief in opposition to the Baranof's petition for review that the issues in this case regarding preemption of state law and state jurisdiction by the Magnuson Fishery Conservation and Management Act soon may be mooted because the federal government expects to adopt a king crab fishery management plan within the near future. Brief of Respondent at 12. This argument fails for several reasons. First, the North Pacific Regional Fishery Management Council first submitted a fishery management plan for king crab in the Aleutian Island/Bering Sea area to the Secretary of Commerce for review on May 25, 1982. To date, the Secretary of Commerce has not approved the plan. Second, the North Pacific Fishery Management Council contemplates that the king crab fishery management plan will incorporate state fishery regulations and that the state regulations will be approved as federal regulations and published in the federal register. *See* 49 Fed. Reg. 33,033

(1984) (to be codified at 50 CFR Part 676) (proposed August 20, 1984). Under this scenario, the issue of preemption remains. Finally, the Baranof has asserted that whether or not the state of Alaska has authority to regulate fishing outside state waters, any action to enforce alleged fishing violations in the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act must be brought in federal district court for the state of Alaska rather than in the state superior courts. 16 U.S.C. § 1861.

A decision in this case by this Court would help resolve conflicts between and give guidance to the various lower courts which have attempted to delineate state fishing regulatory authority after the enactment of the Magnuson Fishery Conservation and Management Act. Even final approval of a fishery management plan for Alaska king crab will not moot the present case or prevent the issues in this case from recurring elsewhere. Lower courts around the country continue to grapple with the accommodation of federal and state interests on this issue. *See, e.g., Bethell v. Florida*, No. 82-1516 Civ., Slip op. (D. Fla. Sept. 29, 1983), *appeal filed*, No. 83-5727 (11th Cir.); *Hjelle v. Brookes*, 377 F. Supp. 430 (D. Alaska 1974), *vacated as moot*, 424 F. Supp. 595 (D. Alaska 1976); *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981); *People v. Weeren*, 26 Cal. App. 3d 654, 163 Cal. Rptr. 255, 607 P.2d 1279 (1980), *cert. denied*, 449 U.S. 839 (1980); *State v. Southeastern Fisheries Association, Inc.*, 415 So.2d 1326 (Fla. Dist. Ct. App. 1982), *rev'd sub nom.*, *Southeastern Fisheries Association v. Department of Natural Resources*, No. 62,288, Slip op. (Fla. April 26, 1984); *Tingley v. Allen*, 397 So.2d 1166 (Fla. Dist. Ct. App. 1981); *State v. Sterling*, 448 A. 2d 785 (R. I. 1982).

Resolution of this continuing uncertainty and lack of uniformity continues to be appropriate, even in the face of possible future Council action.

c. ***The Decision Below Impermissibly Expands the Alaskan In Rem Forfeiture Proceedings Over Vessels Operated by Non-Citizens Outside the State's Boundaries.***

The Alaska Supreme Court confuses the state's *in personam* jurisdiction over fishermen, which is limited solely by the requirement that the fishermen be residents of the state of Alaska, *see, e.g., Skiriotes v. Florida, supra*, with the state's *in rem* admiralty jurisdiction over the vessel which is limited to matters arising under the "saving to suitors" clause of 28 USC § 1333. This confusion has resulted in a decision, unsupported by statute or case law, expanding Alaska's *in rem* forfeiture jurisdiction beyond the state waters in which it was exercised (or saved unto suitors) at common law, *see, C.J. Hendry Company v. Moore*, 318 U.S. 125 (1942), onto the high seas, outside state boundaries, in which the state only has *in personam* jurisdiction of its citizens. *See Skiriotes v. Florida, supra*.

The state of Alaska also ignores the exclusive admiralty interests involved by asserting it may forfeit the interests of persons holding recorded preferred ship mortgages on vessels seized for fishing violations, *see* Brief for Respondent at 24. The state of Alaska fails to cite any authority to extinguish such interests. In fact, preferred ship mortgage interests can be impacted only by a court of the United States, *see* 46 U.S.C. § 961, not a court of the state of Alaska.

The decision below sanctions Alaska's assertion of *in rem* jurisdiction over a vessel operating outside state waters and over ship mortgage interests in that vessel without any historical or legal precedent and represents an unwarranted departure from accepted federal admiralty law.

CONCLUSION

The decision by the court below is final as to all federal issues and is separable from the state issues remaining in the case. Review should be granted at this time to prevent erosion of the federal policy favoring preemption of state authority to regulate vessels outside state waters and the federal policy favoring the resolution by the U.S. district courts of all disputes over fishing outside state waters. The issues presented are novel and a decision by this Court will provide valuable guidance for the other courts that continue to interpret the Magnuson Fishery Conservation and Management Act and seek to accommodate state and federal interests under that act.

Respectfully submitted this
14th day of September, 1984.

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